The Impact of the California High School Exit Examination on High School Seniors Seeking Eligibility for the Cal Grant Entitlement Program

Background

The California Student Aid Commission (CSAC), at its November 18th meeting, discussed the potential impact of the implementation of the California High School Exit Examination (exit exam) on determining eligibility for the Cal Grant Program. This discussion occurred as a result of a recommendation by the Commission's Grant Advisory Committee (GAC) that the Commission establish an alternative means for determining Cal Grant eligibility. At that meeting, the Commission directed staff to research alternative options for determining Cal Grant eligibility for those students who will have successfully completed the required course of high school study but will have failed to pass the exit exam.

Existing Law

Existing law establishes eligibility criteria for the Cal Grant Entitlement Program. The law requires that successful applicants meet specific academic and financial need eligibility criteria, including financial need determined under Education Code section 69433, GPA requirements, and household income and asset levels consistent with levels established under Education Code section 69432.7.

Education Code sections 69434(b)(8) and 69435.3(a)(8) expressly require Cal Grant Entitlement students to have graduated from a California high school or its equivalent during or after the 2000-20001 academic year.

The exit exam requirement was enacted into law in 1999. Education Code section 60851(a) requires each pupil completing grade 12 to pass the California High School Exit Exam "as a condition of receiving a diploma of graduation or a condition of graduation from high school," commencing with the 2003-04 school year. In July 2003, the State Board of Education took action to move the passage of the exit exam as a diploma requirement to the Class of 2006.

The current Cal Grant law was enacted in 2000. Section 2 of the Cal Grant Act, Chapter 403 of the Statutes of 2000 (Senate Bill 1644), provides in relevant part:

> SEC. 2 (a) The Legislature finds and declares all of the following:
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> (4) The Ortiz-Pacheco-Poochigian-Vasconcellos Cal Grant Act makes access and affordability a guarantee to every qualified student. It reaffirms the basic tenants of the 1960 Master Plan for Higher Education by guaranteeing a Cal Grant award to every student who is financially and academically eligible to receive one. Students with financial need and academic merit will no longer wonder whether they will be one of the relatively few students selected to receive a Cal Grant award each year.
> (5) At a time when California is insisting on improved performance and accountability from all students in the public elementary and secondary school system, it is important to follow through on the state's commitment to capable graduates of high schools so they can pursue a quality higher education, especially when their families have limited financial means.

(6) The Ortiz-Pacheco-Poochigian-Vasconcellos Cal Grant Act removes poverty as a barrier to access to the opportunities of a higher education for all academically successful students and provides an opportunity to enroll and complete higher education and take on the challenges presented by the Information Age and the ever-changing, technology-driven economy of the 21st century.
(7) The Ortiz-Pacheco-Poochigian-Vasconcellos Cal Grant Act takes an historic step in putting California at the forefront of the nation in providing access to all academically qualified students with financial need who are pursuing the dream of a higher education. With the enactment of this measure California will keep faith with its decades-long promise to make higher education available and affordable to every qualified student who deserves a chance to aim high and succeed.

* * *

(Chap. 403, Stats. 2000, § 2 [emphasis added].)

Senate Bill 1644, which established the Cal Grant Entitlement Program, also required that the Commission adopt regulations to implement the new Cal Grant Entitlement and Competitive grant programs. (Educ. Code, § 69433.7.) This new law required the Commission, for the first time, to define in regulations, specific policies governing the administration of the Cal Grant program. This law restricted the Commission's ability to expand the student eligibility pool to those students defined in law or in regulation.

This change in administering the Cal Grant program---to a grant program that required the promulgation of regulations--- altered the administrative flexibility of the Commission in exchange for a guarantee of funding for all students deemed eligible to receive Cal Grant assistance. The adoption of regulations required that the Commission clarify and define the standards by which students are determined eligible as specified in law.

Grant Advisory Committee Recommendations

At its November meeting, the Commission's Grant Advisory Committee (which consists of representatives of the public and private postsecondary education sectors, students and financial aid staff) recommended that:

"GAC recommends to the Commission, to the extent it is able to do so and based on legal counsel's opinion, that CSAC execute an administrative decision that would allow the Ability to Benefit (ATB) test to be an indicator of eligibility for the Cal Grant as an equivalency to high school graduation for those students who failed to earn a diploma of graduation because of their inability to pass the [exit] exam.

"In absence of legal guidance on an administrative solution, GAC would recommend that the Commission proceed with emergency regulations that will allow the ATB test to be an indicator of eligibility for the Cal Grant as an equivalency to high school graduation for those students who failed to earn a diploma of graduation because of their inability to pass the [exit] exam.

"In absence of regulations, GAC recommends that CSAC seek emergency legislation that would allow the ATB test be an indicator of eligibility for the Cal Grant as an equivalency to high school graduation for those students who failed to earn a diploma of graduation because of their inability to pass the [exit] exam so students are no disenfranchised.

"GAC further recommends that to the extent that CSAC staff is able, they formulate estimates of the number of students potentially affected so that the rationale for this decision can be supported. If an actual number is not available, CSAC staff should formulate at least an estimated range of the number of students affected."

Commission Direction

As a result of the Commission's discussion of the GAC recommendation, CSAC staff was directed to review alternative options for determining Cal Grant eligibility for those students who complete their high school course of study but fail passage of the exit exam.

The following is an examination of those options.

Options

1. Implement Policy Without Adopting a Regulation

It may be argued that the Commission has authority to adopt federal policies administratively based on the Commission's use of federal policies to establish financial need and on policies implemented under the predecessor Cal Grant statute without regulations. Both examples are problematic. First, Education Code sections 69432.9, 69433, and 69506 mandate the Commission's use of specific federal policies to determine financial need. There are no statutes that expressly mandate the use of federal Ability-to-Benefit tests as equivalent substitutes for passing the California high school exit exam. Second, policies administratively adopted under the predecessor Cal Grant statute do not provide justification for such action under the current Cal Grant Act, especially since the current Cal Grant Act expressly requires the adoption of regulations to implement the program. (Educ. Code, § 69433.7.)

Thus, if the Commission desires to act administratively, it must proceed through the regulatory process.

2. Adopt a Regulation

The Administrative Procedure Act establishes the legal requirements for regulations, but presents two major obstacles to the Commission's ability to adopt federal Ability-to-Benefit tests as the "equivalent" of high school graduation.

a. The Commission Must Have Authority To Adopt The Specific Regulation

First, the Administrative Procedure Act requires the Office of Administrative Law (OAL) to determine that an agency adopting a regulation has the authority to adopt the regulation. (Gov. Code, § 11349.1(a)(2).) "Authority" is defined as the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." (Gov. Code, § 11349(b).)

It is probable that the Commission's recognition of federal Ability-to-Benefit tests as equivalent to high school graduation for Cal Grant eligibility purposes would improperly infringe on the authority granted by Education Code section 60856 to the State Board of Education and the Superintendent of Public Instruction to develop other criteria by which high school pupils who are regarded as highly proficient but unable to pass the high school exit examination may demonstrate their competency and receive a high school diploma. The alternative test must be of equal rigor in the academic areas covered by the high school exist examination. Further, that section mandates that any alternatives developed by the State Board of Education and the Superintendent of Public Instruction be enacted as legislation, not as regulations.

This is reinforced by the fact that other procedures that have been deemed by the law as equivalent to high school graduation also require either the State Board of Education or the Superintendent of Public Instruction (through the State Department of Education) to ensure that these other procedures meet the same standards expected of high school instruction. (See Educ. Code, § 51420 [certificate of equivalency requires passing a general educational development test; passing score on the test must be determined by the State Board of Education to be equal to the standard of performance expected from high school graduates]; Educ. Code, § 48413 [certificate of proficiency deemed to be the equivalent of high school graduation; State Department of Education establishes criteria verifying test's measurement of proficiency in basic skills taught in public high school].)

Within the context of this existing law, it is very difficult to assert that the Commission has the authority to adopt educational policy otherwise granted to the State Board of Education and the Superintendent of Public Instruction. The argument that the Commission is merely interpreting financial aid policy, not educational policy, is not persuasive because the Cal Grant Act expressly provides that students must possess academic qualifications in addition to financial need. Section 2 of the Cal Grant Act establishes the Legislature's intent that Cal Grants are for students who are financially needy and "qualified," "academically eligible," possessing "academic merit," and "academically successful." The Cal Grant Act was enacted in 2000, after the exit exam statute (Educ. Code, §§ 60850-60859) was enacted in 1999, and thus, must be construed consistently with the exit exam statute. If only the State Board of Education, in consultation with the Superintendent of Public Instruction, is authorized to determine criteria by which competency can be established other than by passing the exit exam (Educ. Code, § 60856), the Commission's adoption of the federal Ability-to-Benefit tests as equivalent to passing the exit exam, even if only for Cal Grant purposes, is likely to be beyond the Commission's authority.

Thus, it is likely that OAL will determine that the Commission does not have the authority to determine that a passing score on a federal Ability-to-Benefit test is the equivalent to high school graduation if the State Board of Education and the Superintendent of Public Instruction have not determined that the federal Ability-to-Benefit tests are a proper criteria by which high school pupils who are unable to pass the exit exam may demonstrate their competency.

b. The Commission's Regulation Must Be Consistent With Existing Law

Second, even if the authority issue could be surmounted, the requirement of consistency presents a further obstacle. The Administrative Procedure Act requires the Office of Administrative Law to review a regulation for consistency. (Gov. Code, § 11349.1(a)(4).) "Consistency" is defined as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov. Code, § 11349(d).)

Education Code section 60851 now requires a student to pass the exit exam, in addition to completing the high school course work, as a condition of graduation. Further, alternatives to the exit exam must be of equal rigor in the academic areas covered by the high school exist exam. Thus, to show consistency between high school graduation, i.e., completion of the high school course work and passing the exit exam, and completing the course work and passing a federal Ability-to-Benefit test, the Commission will need some documentation or proof establishing that a passing grade on a federal Ability-to-Benefit test constitutes achievement to the same standard measured by a passing grade on the high school exit exam.

The requirement in the Cal Grant Act that an alternative adopted by the Commission be "equivalent" to high school graduation reinforces the Administrative Procedure Act requirement of consistency.

Under well-established principles of statutory construction, courts construe provisions of a statute by looking first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. (In re Jesusa V. (2004) 32 Cal.4th 588, 652.)

However, to seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, *in the legal and broader culture*. (State of California v. Altus Finance (2005) 36 Cal.4th 1286, 1295-1296 [emphasis in original].) Courts do not construe statutes in isolation; rather, they construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided. (Coachella Valley Mosquito & Vector Control District v. California Public Employment Relations Board (2005) 35 Cal.4th 1072, 1089.)

"Equivalent" has a plain meaning of being "equal, as in force, value, or meaning," and "having identical or similar effects," "corresponding or practically equal in effect." (Webster's II New College Dictionary (1995) p. 381.) Cases construing this term in the context of particular laws generally confirm the application of this plain meaning.

For example, McCorkle v. State Farm Insurance Company (1990) 221 Cal.App.3d 610, involved a dispute between a homeowner and the homeowner's insurance company over the replacement of a garage which had been destroyed by fire. The original garage had had a wooden floor. City requirements, however, mandated the replacement floor to be cement, which required additional foundational support.

The insurance policy provided that the insurance company would pay "the replacement cost of that part of the building damaged for equivalent construction and use on the same premises…." (*Id*. at 614.) The insurance company offered to pay $29,350, which was the cost of a wooden floor. The homeowner, demanded $58,448, the cost of a replacement garage with a cement floor.

The trial court ruled that the replacement of a wooden floor with a concrete floor, with an increase of nearly 100% of replacement cost, did not constitute "equivalent construction." The appellate court affirmed the trial court's ruling, noting, among other reasons, that the ruling was consistent with the plain meaning of the policy language. Relying on the Black's Law Dictionary definition of "equivalent" as "equal in value, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance; alike, identical," the appellate court found that a garage with a cement floor, costing almost twice as much as one with a wooden floor, is not "equal in value" nor is it "identical" to the insured structure that was destroyed. (*Id*. at 615.)

Kerchkhoff-Cuzner Mill and Lumber Company v. Olmstead (1890) 85 Cal. 80 reinforces the application of the plain meaning of "equivalent." In this case, a subcontractor provided materials for a contractor who was building a home on a lot. The contractor ceased working on the home for more than 30 days. Several months later, a different contractor completed the home, which was accepted by the lot owner. The subcontractor then filed a mechanic's lien to recover the costs of materials for which it had never been paid.

The mechanic's lien law provided that a subcontractor was prohibited from filing a lien before completion of a building. An amendment to the mechanic's lien law was passed and provided that "cessation from labor for thirty days upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all purposes of this chapter." (*Id*. at 83.)

The subcontractor argued that the purpose of the amendment was to remove the prohibition against subcontractors filing a lien before completion of a building and to allow subcontractors to file their liens before actual completion of the building. The defendant lot owner argued that the language of the amendment not only allowed subcontractors to file liens before completion, but also then required them to file their liens within 30 days from the cessation of work on the building.

The court held that the words "shall be deemed equivalent to a completion" meant "shall be equal in legal effect to a completion; that is, shall be treated for the purpose of filing a lien, as an actual completion." (*Id*. at 84.) Thus, the subcontractor was required to file its lien within 30 days after the original contractor had ceased work on the home. Essentially, the court found that "equivalent" not only involved procedural equivalence, but also substantive equivalence for purposes of that statute.

Ceridian Corporation v. Franchise Tax Board (2000) 85 Cal.App.4th 875, further emphasizes the definition of "equivalent" as requiring substantive equivalence. A taxpayer challenged a California tax on insurance company dividends paid to major corporate shareholders that allowed corporations commercially domiciled in California to deduct certain insurance company dividends, and thus effectively imposed a greater tax if the taxpayer was domiciled outside California, than if domiciled in California. The taxpayer asserted the tax violated the federal Commerce Clause prohibition against states taxing in-state (intrastate) and out-of-state (interstate) transactions differently.

Under the concept of compensatory tax defense, a state may show that different treatment of in-state (intrastate) or out-of-state (interstate) events does not violate the Commerce clause. The essence of the defense is that interstate commerce may be taxed differently, i.e., more heavily, to compensate for a tax burden already borne solely by intrastate commerce. In other words, because a state imposes a high tax on a type of transaction that occurs only within the state, that state may impose a similar level of taxation on transactions that occur only in interstate commerce to equalize the burdens and prevent an advantage to interstate commerce.

A state, however, cannot impose a higher tax on interstate commerce for an unrelated transaction. There must be some relationship between the transactions or events being taxed to justify the different level of taxation on interstate commerce. A state using the compensatory tax defense must show that, among other things, the transactions on which the interstate and intrastate taxes are imposed are "substantially equivalent." The court explained that "substantially equivalent" meant that the transactions must be sufficiently similar in substance to serve as mutually exclusive "proxies" for each other. (*Id*. at 885-886.) Although it is dicta, i.e., not binding on the parties, the court's discussion states the current California law.

Here, the Cal Grant Entitlement awards may only be awarded to students who graduated from "high school or its equivalent" within certain time periods. Graduation from high school now requires passage of the exit exam, in addition to the completion of the high school course work. Applying the McCorkle analysis, the Commission would be required to ensure than any measure which it finds to be the "equivalent" of high school graduation must be equal or identical in value, force, or effect as high school graduation. That equal value, force, or effect applies to the competency measured by completing the high school course work and passing the exit exam. Thus, an alternative test adopted by the Commission to establish equivalency with high school graduation must establish the competency of the student to the same standard established by the exit exam. The Kerchkhoff-Cuzner case reinforces this substantive equivalency. Procedural equivalence of an alternative – i.e., qualifying a student for Cal Grant eligibility – must be accompanied by substantive equivalence – i.e., equivalence in competencies measured by the alternative. Finally, the Commission's alternative under the Ceridian standard must be sufficiently similar in substance, i.e., measure of competency, to the high school exit exam.

Ridgecrest Charter School v. Sierra Sands Unified School District (2005) 130 Cal. App.4th 986, further supports, from a procedural perspective, the McCorkle court's analysis of "equivalent." In this case, a charter school asked a public school district to use the district's facilities for the school's 223 students in kindergarten through eighth grade. The Charter Schools Act of 1992 established charter schools as an alternative to district schools. Amendments in 1998 provided that charter school financing was to be equal to that which would be available to a similar school district serving a similar population, and required school districts in which a charter school operated to permit the charter school to use facilities not currently being used by the school district. (*Id*. at 992-993.)

Proposition 39, however, added new mandates requiring a school district to make its educational facilities available to charter schools operating in the district under conditions "reasonably equivalent" to those facilities that charter school students would have had if they were attending a non-charter school in the same district, and requiring the facilities to be contiguous. (*Id*. at 993.)

In this case, the school district offered the charter school the use of 9.5 classrooms at five different school sites separated by a total of 65 miles. The charter school argued that the school district failed to provide contiguous facilities. The school district argued that the requirement for contiguous facilities did not mandate a school district to excessively disrupt the education of district students to accommodate charter school students, and that the school district had the discretion to determine whether the contiguity requirement was excessive in particular cases.

The appellate court, however, focused its analysis on the "reasonably equivalent" requirement to decide whether the school district had the discretion it claimed. The court analyzed the history of the statute and the law as a whole to conclude that the requirement that facilities be contiguous had to be interpreted in the context of the statutory mandate that facilities be "reasonably equivalent." The Court found that the mandate that facilities be "reasonably equivalent" required the school district to give the same degree of consideration to the needs of charter school students as it did the students in district-run schools, and did not give the school district discretion to act otherwise. (*Id*. at 999.)

As applied to the exit exam issue, Ridgecrest establishes that the Commission's "equivalent" alternative must require the same degree of competency and achievement as the current standards established for graduation from high school, i.e., completion of the course work and passage of the exit exam. As noted above, current law recognizes equivalents of high school graduation. Education Code section 51420 authorizes the Superintendent of Public Instruction to grant high school equivalency certificates to persons over 18 who obtain a passing score on a general educational development test, but expressly specifies that the passing score must be "determined by the State Board of Education to be equal to the standard of performance expected from high school graduates." (Educ. Code, § 51420(b).) Background information on the General Education Development Test is provided on Attachment A.

Similarly, persons over 16 may receive certificates of proficiency, which are established by law to be the equivalent of high school graduation. (Educ. Code, § 48412(a).) The Education Code, however, expressly requires the State Department of Education to develop standards of competency in basic skills taught in public high schools and must administer examinations that will verify that competency. (Educ. Code, § 48412(b).)

Thus, the standards by which the Commission may determine the "equivalent" of high school graduation must be read in context of the entire law. Existing alternatives that constitute the equivalents of high school graduation require passing scores on tests that are equal to the standard of performance expected from high school graduates or to the standards of competency in basic skills taught in public high schools.

The Commission, therefore, may choose an alternative "equivalent" to high school graduation if that alternative establishes the students meet the same degree of competency and achievement as the current standards established for graduation from high school.

The Commission does not now have such documentation for the federal Ability-to-Benefit tests. Commission staff asked the United States Department of Education, the California Postsecondary Education Commission, the California State Department of Education, and the Office of the Secretary of Education if they had any documentation on the validity and effectiveness of the federal Ability-to-Benefit tests. Each agency indicated that these types of reports have not been published or are not available. Commission staff asked Ability-to-Benefit test publishers whether they had this information. Two publishers have recently forwarded information on the validity of their tests to the staff. Staff will forward the information to the State Board of Education and the State Department of Education for their opinions on whether the tests measure student competency to the same standards as the exit exam.

Commission staff is continuing to research the matter. Assuming that the Commission decides to proceed with a regulation, even in face of the obstacle presented by the "authority" requirement, pursuing a regulation would be premature until documentation supporting equivalency is available. Background information on federal Ability-to-Benefit tests is provided on Attachment A and Attachment B.

3. Support Legislation

On November 30th, 2005, State Superintendent of Public Instruction Jack O'Connell announced that he will be holding a public meeting to hear information on alternative options to the existing California High School Exit Exam that "are of equal rigor and are an appropriate means of assessing these students," on Thursday, December 15 in Sacramento. This hearing will provide an opportunity for the Superintendent to consider alternative options that he can report to the State Board of Education at is January 2006 meeting. As noted above, current law provides that the State Board of Education, in consultation with the Superintendent of Public Instruction, must study the appropriateness of other criteria by which "high school pupils who are regarded as highly proficient but have been unable to pass the high school exit examination, may demonstrate their competency and receive a high school diploma". (Educ. Code, § 60856.)

Section 60856 also specifies that these alternative criteria shall include, but not be limited to, "an exemplary academic record as evidenced by transcripts and alternative test of equal rigor in the academic areas covered by the high school exit examination". The law states that if the State Board of Education determines that other criteria are appropriate and that they do not undermine the intent of the high school exit examination (e.g., that all high school graduate demonstrate satisfactory academic proficiency), that these recommendations should be forwarded to the Legislature.

Superintendent O'Connell's letter inviting the public's participation in the December 15 hearing indicates that he intends to work with the State Board of Education, the Governor and the Legislature, in implementing an option or options that meet this standard before June, 2006.

Commission staff will be forwarding a letter to the Superintendent by December 7 in regards to the Commission's concerns about how the implementation of the California High School Exit Examination will impact eligibility for the Cal Grant program.

Depending on the contents of legislation that may be adopted, the Commission may need to do nothing other than apply the law, or may need to adopt a regulation. The legislation should, if properly drafted, eliminate the concerns of authority and consistency.

Recommendation

Staff recommends that the Commission adopt option 3: Support Legislation. Option 1 is not legally supportable. Option 2 is based on the legally questionable assumption that a Commission decision that the federal Ability-to-Benefit test is equivalent to high school education does not involve education policy, the authority for which has been granted to the State Board of Education and the Superintendent of Public Instruction. Further, the Commission does not now have a supportable basis for asserting that a passing grade on a federal Ability-to-Benefit test is the substantive equivalent to passing the California exit exam, and therefore cannot establish compliance with the consistency requirement imposed by the Administrative Procedure Act.